



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

[Docket No. FHWA-2016-0002]

RIN 2125-AF70

Tribal Transportation Self-Governance Program

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent to establish the Tribal Transportation Self Governance Program Negotiated Rulemaking Committee; request for comments and nominations.

SUMMARY: The FHWA is announcing its intent to establish a negotiated rulemaking committee to develop a proposed rule to carry the Tribal Transportation Self-Governance Program (TTSGP) as required by Section 1121 of the Fixing America's Surface Transportation (FAST) Act. The FHWA will select the tribal representatives for the committee from among elected officials of tribal governments (or their designated employees with authority to act on their behalf), acting in their official capacities and whose tribes have existing Title 23 U.S.C. funding agreements with the Department. To the maximum extent possible, FHWA will consider geographical location, size, and existing transportation and self-governance experience, in selecting tribal committee representatives. Per the FAST Act, the committee will assist in the development of a Notice of Proposed Rulemaking that contains the proposed regulations needed to implement the TTSGP.

DATES: Nominations from tribes for membership on the negotiated rulemaking committee and comments on the establishment of this committee, including additional

interests other than those identified in this notice, must be postmarked or faxed no later than [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION].

ADDRESSES: You may submit comments identified by the docket number FHWA-2016-0002 by any one of the following methods:

Fax: 1-202-493-2251;

Mail: U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590;

Hand Delivery: U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or

Electronically through the Federal eRulemaking Portal: <http://www.regulations.gov>.

Follow the online instructions for submitting comments. All submissions must include the agency name, docket name and docket number or Regulatory Identification Number for this rulemaking (2125-AF70). Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or to U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20950, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Submission of Nominations

Send nominations to the Designated Federal Official, at the following address:
Robert W. Sparrow, Director – Office of Tribal Transportation Program, Federal
Highway Administration, Room E61-314, 1200 New Jersey Ave, SE, Washington, DC
20590. Or email to: FHWA-TTSGP@dot.gov.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. The DOT posts these comments, without edit, including any personal information the comment provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

FOR FURTHER INFORMATION CONTACT: Robert W. Sparrow, Designated Federal Official, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: (202) 366-9483 or at robert.sparrow@dot.gov. Vivian Philbin, Assistant Chief Counsel, 12300 West Dakota Avenue, Lakewood, CO 80228. Telephone: (720) 963-3445 or at Vivian.Philbin@dot.gov.

SUPPLEMENTARY INFORMATION:

- I. Introduction
- II. Background
- III. The Concept of Negotiated Rulemaking
- IV. Facilitation
- V. The TTSGP Negotiated Rulemaking Committee
 - A. Purpose of the Committee

- B. Committee Member Responsibilities
- C. Composition of the Committee
- D. Administrative and Technical Support
- E. Training and Organization
- F. Interests Identified Through Consultation

VI. Request for Nominations

VII. Submitting Nominations

I. Introduction

Under the Negotiated Rulemaking Act, the purpose of the TTSGP Negotiated Rulemaking Committee will be to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule for the TTSGP, as codified at 23 U.S.C. 207. The responsibilities/objectives of the committee are to represent the interests significantly affected by the proposed regulations, to negotiate in good faith, and to reach consensus, where possible, on a recommendation to the Secretary for the proposed regulations.

Section 1121 of the FAST Act directs the Secretary to carry out this work through negotiated rulemaking pursuant to subchapter III of chapter 5 of Title 5, United States Code. This subchapter requires an agency head to give consideration to seven factors when determining whether a negotiate rulemaking is appropriate. Upon reviewing the seven considerations set forth in the Negotiated Rulemaking Act and in accordance with Section 1121 of the FAST Act, the Secretary, through the authority delegated to the

Administrator of the Federal Highway Administration, has determined that negotiated rulemaking is appropriate.

II. Background

Section 1121 of the FAST Act requires the Secretary to:

- Establish a negotiated rulemaking committee to negotiate and develop regulations on the TTSGP;
- Reflect the unique government-to-government relationship between Indian tribes and the United States in accordance with Executive Order 13175 dated November 6, 2000, the Presidential Memorandum on Tribal Consultations issued on November 5, 2009, and U.S. Department of Transportation's Tribal Consultation Plan in establishing a negotiated rulemaking committee;
- Ensure that the membership of the committee includes only representatives of the Federal Government and of tribes that currently have funding agreements under Title 23;
- Select the tribal representatives for the committee from among individuals nominated by the tribes; and
- Ensure, to the maximum extent possible, a balance of representation with regard to geographical location, size, and existing transportation and self-governance experience in selecting tribal committee representatives.

III. The Concept of Negotiated Rulemaking

The negotiated rulemaking process is fundamentally different from the usual process for proposed regulations. Most proposed regulations are drafted by a Federal agency and are then published for public comment. Affected parties may submit comments supporting their positions during the public comment period without communicating with other affected parties. Under the negotiated rulemaking process, a committee of representatives of the interests that will be significantly affected by the rulemaking negotiates the provisions of the proposed regulations with the agency. Negotiated rulemaking allows the Federal agency and the affected interests represented on the committee to discuss possible approaches to various issues and to negotiate the content of the regulations before proposed regulations are published. It also allows the affected parties to share information, knowledge, expertise, and technical abilities and to resolve their concerns about the regulations before publication.

One of the key principles of negotiated rulemaking is that agreement is by consensus of all of the interests and that no one interest or group controls or dominates the process. The Negotiated Rulemaking Act defines consensus as the unanimous concurrence among interests represented on a negotiated rulemaking committee, unless the committee agrees to define such term to mean a general but not unanimous concurrence or agrees upon another specified definition. The agency head, to the maximum extent possible consistent with the agency's legal obligations, uses the consensus of the committee as the basis for proposed regulations.

IV. Facilitation

Experience of various Federal agencies in negotiated rulemaking has demonstrated that using a trained neutral person to facilitate the process assists all parties during negotiations to identify their real interest, evaluate their positions, communicate effectively, find common ground, and reach consensus where possible. The FHWA may use trained facilitators to assist with facilitating the first committee meeting. These facilitators may attend subsequent committee meetings and provide other services as required.

V. The TTSGP Negotiated Rulemaking Committee

As required by the FAST Act, the TTSGP Negotiated Rulemaking Committee will be formed and will operate under the Negotiated Rulemaking Act.

A. Purpose of the Committee

The committee shall develop proposed regulations to carry out the TTSGP in accordance with 23 U.S.C. 207. The regulations will include details on eligibility criteria, the contents of program compacts and annual funding agreements including funding types, roles and responsibilities of tribes and the Federal Government, length terms, redesign and consolidation, retrocession, and termination. In addition, the committee will review and include cost principles, monitoring, waivers, and the applicability of the Indian Self-determination and Education Assistance Act.

B. Committee Member Responsibilities

The Committee is estimated to meet approximately 10 times. Due to limited availability of funding, FHWA reviewed various locations across the country in order to determine costs for the meetings. Accessibility, travel costs, per diem rates and the

number of expected travelers were all considered. As a result of location (close proximity to three Bureau of Indian Affairs regions this reducing travel and overall per diem rates), it is expected that a majority of the meetings will be held in Albuquerque, New Mexico. However, other meetings may be held in locations across Indian Country as long as the overall meeting costs are equal to or less than Albuquerque and the location is approved by the committee. The meetings are expected to last 3 to 4 days each. Committee members will also be expected to participate in other regional tribal meetings to present status reports of the committee's activities. The Committee's work is expected to occur over the course of 10-12 months.

Committee members will not receive pay for their membership, but will be compensated for travel and *per diem* expenses while performing official committee business, consistent with the provisions of 5 U.S.C. 568(c) and Federal travel regulations. Funding for additional travel or caucusing efforts may be available but only after the approval of the Designated Federal Official. Alternate members will not be permitted to represent those individuals appointed by the Secretary without prior written agreement from the Department. An appointed committee member may be removed and replaced if that committee member fails to attend two consecutive meetings or fails to attend a total of four committee meetings. The resulting vacancy would be filled in the same manner as the original appointment was made.

Because of the scope and complexity of the tasks at hand, committee members must be able to invest considerable time and effort in the negotiated rulemaking process. Committee members must be able to attend committee meetings, work on committee

work groups, consult with their constituencies between committee meetings, and negotiate in good faith toward a consensus recommendation on issues before the committee. Because of the complexity of the issues under consideration, as well as the need for continuity, the FHWA reserves the right to replace any member who is unable to fully participate in the committee's meetings.

C. Composition of the Committee

The FHWA is seeking nominations for tribal representatives to serve on the committee. Nominees should be elected officials of tribal governments (or their designated employees with authority to act on their behalf), acting in their official capacities individuals nominated by and identified as representatives of tribes and whose tribes have with existing Title 23 U.S.C. funding agreements with the Department. Nominees should have a demonstrated ability to communicate well with groups about the interests they will represent. Tribal committee membership must be tribal government representatives, a majority of whom shall be nominated by and be a representative of Indian tribes with existing funding agreements under this title.

The FAST Act requires FHWA to ensure that the various interests affected by the proposed regulations be represented on the negotiated rulemaking committee. In selecting members, FHWA shall consider whether the interest represented by a nominee will be affected significantly by the final products of the committee, whether that interest is already adequately represented by other tribal nominees, and whether the potential addition would adequately represent that interest.

If nominations received in response to this notice do not adequately meet the statutory requirements for tribal committee membership, or do not represent the interests that will be significantly affected by the regulations, FHWA may add representatives of its own choosing. The FHWA's decisions regarding the addition of representatives will be based on: meeting the requirements of the Act; achieving a balanced committee; and assessing whether an interest will be affected significantly by the final rule, whether that interest is already adequately represented by tribal nominees, and whether the potential addition would adequately represent that interest.

The total committee membership is expected to be no more than 25 members in accordance with Section 565(b) of the Negotiated Rulemaking Act.

D. Administrative and Technical Support

The FHWA Office of Federal Lands Highway will provide technical support for the committee. This office will arrange meeting sites and accommodations, arrange travel for tribal committee members, ensure adequate logistical support (equipment, personnel, etc.) at committee meetings, provide committee members with all relevant information, distribute written materials, ensure timely reimbursement of authorized expenses for committee members, maintain records of the committee's work, and support the committee as otherwise required.

E. Training and Organization

At the first meeting of the TTSGP Negotiated Rulemaking Committee, a neutral facilitator will provide training on negotiated rulemaking, interest-based negotiations, consensus-building, and team-building. In addition, at the first meeting, committee

members will make organizational decisions concerning protocols, scheduling, and facilitation of the committee. All committee members must attend the first meeting. Attendance at all subsequent meetings is mandatory as well unless a written excused absence is obtained from the Designated Federal Official.

F. Interests Identified Through Consultation

A key principle of negotiated rulemaking is that agreement is by consensus of all of the significantly affected interests. Section 562 of the Negotiated Rulemaking Act defines the term “interest” as “with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner.” In making the selection of the committee members, all effort will be made so as to result in a geographically diverse committee. In addition, the magnitude of program size as well as experience in transportation and self-governance will be considered in the committee selections so as to identify and include all significantly affected interests.

There may be other interests not yet identified that will be significantly affected by the regulations. The Department is accepting comments until the date listed in the **DATES** section of this notice on the identification of any other interests that may be significantly affected by the proposed regulations.

VI. Request for Nominations

Under the requirements stated in the **Background** section, the Secretary invites tribes to nominate tribal primary representatives to serve on the committee and tribal alternates to serve when the representative is unavailable. It is expected that the committee will be composed of one tribal representative from each of the 12 BIA

Regions, along with a lesser number of Federal representatives. Additional tribal representatives will be considered if the Secretary believes that it would result in better serving tribal interests. Although each federally recognized tribe that has a funding agreement under Title 23 may nominate a representative and alternate for the committee, it is strongly encouraged that all nominating tribes within a BIA Region agree to nominate and thus support one primary representative and one alternate for that Region. Because committee membership should reflect the diversity of tribal interests, tribes should nominate representatives and alternates who will:

- Have knowledge of existing self-governance regulations, policies, and procedures;
- Be able to represent the tribe(s) with the authority to embody tribal views, communicate with tribal constituents, and have a clear means to reach agreement on behalf of the tribe(s);
- Be able to negotiate effectively on behalf of the tribe(s) represented;
- Be able to commit the time and effort required to attend and prepare for meetings; and
- Be able to collaborate among diverse parties in a consensus-seeking process.

In order to achieve as much tribal diversity and representation as possible, the Secretary also invites nominations from intertribal consortia and tribal organizations as well. Nominees of these interests, like the proportionate-share nominees, must meet the criteria of this section.

If anyone believes their interests will not be adequately represented by the interests noted above, they must demonstrate and document that assertion through an application. The FHWA requests comments and suggestions regarding its tentative identification of affected interests.

VII. Submitting Nominations

The FHWA will consider only nominations for tribal committee representatives nominated through the process identified in this **Federal Register** notice. Nominations received in any other manner or for Federal representatives will not be considered. Only the Secretary may appoint Federal employees to the committee.

Nominations must include the following information about each tribal committee member nominee:

- (1) The nominee's name, tribal affiliation, job title, major job duties, and employer business address, telephone number, and e-mail address;
- (2) The tribal interest(s) to be represented by the nominee (see section V of this notice) and whether the nominee will represent other interest(s) related to this rulemaking, as the tribe may designate;
- (3) A resume reflecting the nominee's qualifications and experience in transportation, the negotiated rulemaking process, and existing self-governance regulations; and
- (4) A brief description of how they will represent tribal views, communicate with tribal constituents, and have a clear means to reach agreement on behalf of the tribe(s) they are representing. Additionally, a statement whether the nominee is only representing

one tribe's views or whether the expectation is that the nominee represents a group of tribes.

To be considered, nominations must be received by the close of business on the date listed in the **DATES** section, at the location indicated in the **ADDRESSES** section. Nominations and comments received will be available for inspection at the address listed above from 8 a.m. to 4 p.m., Monday through Friday, except Federal holidays.

Issued on: April 18, 2016

Gregory G. Nadeau
Administrator
Federal Highway Administration

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